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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 164

TOMLINSON I. MOSELEY, RALPH M. KEELE and KEELMO CO. (a corporation),
Petitioners,

vs.

UNITED STATES APPLIANCE CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent opposes the granting of the Petition for Writ of Certiorari, and submits that the Petition fails to set forth circumstances or facts warranting a review by this Court.

1. QUESTIONS PRESENTED BY PETITIONERS IN THE PETITION FOR WRIT OF CERTIORARI.

The Petitioners have sought to analyse the judgment of the Circuit Court of Appeals and have presented two sets of questions which they deem must be answered. Unfortunately the two sets of questions are not identical and bear separate analysis.

On Page 2 of the Petition we find that "There is involved herein solely the following questions of patent law:

> 1. Is the act of granting a license under a patent in and of itself an act of patent infringement?
>
> Is the transfer of title of one's own patent *in and of itself** an act of patent infringement?
>
> 3. Is the act of granting a license under a patent an act of contributory infringement of a third party's patent where the acts of the licensee in making and selling and using the licensed devices are legal *because of invalidity of the third party's patent as to licensee?*

On Page 8 of the Petition we however find the statement that "The decree of the Ninth Circuit Court of Appeals raises three questions of law", as follows:

> 1. Does the mere act of granting a license under patents owned by licensor without any participation in the manufacture, use of sale of devices manufactured by the licensee in itself constitute an act of patent infringement by the

*Emphasis ours unless otherwise noted.

licensor of a patent owned by a third party such as to make such licensor liable in damages for the royalty it has received from such licensee in view of Sec. 4884 R. S. (U.S.C. Title 35, Sec. 40) and the decisions of this Court in *Carbice Corporation v. American Patents Development Corp.*, 283 U. S. 27, 51 S. Ct. 334, 336, and *Mercoid Corporation v. Mid-Continent Inv. Co.*, 320 U. S. 661, 64 S. Ct. 268, 274?

2. Does the act of disclosing to a prospective licensee a model or models of an invention and then subsequently granting a license under patents owned by licensor without any participation by licensor in the manufacture, use or sale of the devices by the licensee constitute an act of infringement of a patent owned by a third party such as to make such licensor liable in damages for any portion of the royalties it has received from such licensee, particularly in view of the fact *that by judicial decision the patent of said third party is invalid as to such licensee, making its acts legal?*

3. Does the *sole* act of selling one's own patent to another *in and of itself* constitute an act of patent infringement so as to make the vendor thereof liable to a third party patent owner and entitle the latter to a portion of the sales price received by the vendor where the vendee does not manufacture, sell or use any devices whatsoever?

2. ANALYSIS OF QUESTIONS PRESENTED BY PETITIONERS.

It is believed that several of the above questions are not properly involved herein and therefore these shall be first discussed and disposed of:

A. Question Relating to Transfer of a Patent.

The questions:

> "Is the transfer of title of one's own patent *in and of itself an act of* patent infringement?"

and

> "Does the *sole* act of selling one's own patent to another *in and of itself* constitute an act of patent infringement so as to make the vendor thereof liable to a third party patent owner and entitle the latter to a portion of the sales price received by the vendor when the vendor does not manufacture, sell or use any devices whatsoever."

may, it is submitted, be discussed together.

There is no finding, or decision or other holding in this case that "the transfer of title of one's own patent *in and of itself*" is "an act of patent infringement."

The Order of Court dated May 4, 1944 (R. 166) was amended, pursuant to a Motion to Amend (R. 170) to hold:

> "12. That a further accounting of the profits of the Keelmo Co. be made of which the Plaintiff is entitled to an award of one-half of the royalties received after October 31, 1942 from the Rilling-Arnao Company and *one-half of the sum of four thousand dollars constituting the sale price received by the Keelmo Co. from Earl S. Douglass*

for the sale and transfer of the entire right, title and interest in and to the Keelmo patents and the license agreement with the Rilling-Arnao Company thereunder, after certain allowable deductions including * * *"

Pursuant to said Order of Court dated May 4, 1944, as amended, the District Court made a further accounting of the profits of the Keelmo Co. as follows (R. 176):

1. "That from November 1, 1942 to the date hereof, the defendant Keelmo Co. received royalties in the amount of $4,964.82 and the *sum of $4,000 for the sale of a license agreement between said Keelmo Co. and the Rilling-Arnao Company and the patents specified therein,* both of which constitute accountable profits of the Keelmo Co."

In its opinion rendered April 23, 1946 (R. 209-215) the Circuit Court of Appeals did not mention the foregoing specific findings. However the Circuit Court of Appeals did affirm the lower court's judgment and, it must be assumed, did thereby affirm the foregoing findings. It should be noted that there was never at any time a transfer of the Petitioners' patents by themselves *but that they were only transferred together with the license agreement to which they related.* In awarding the Respondent a portion of the sale price received for the *license and patents* the Court was merely following the law in granting to the Respondent, as profits a portion of all of the money which flowed to Petitioners from their acts of patent infringement as determined by the Court. It is respectfully submitted that money received from

the sale of the license agreement is as much a profit derived therefrom as were royalties paid pursuant thereto.

In addition, it will be noted that in the second of the questions now being discussed, the Petitioners qualify the same by reciting that

> "the vendee does not manufacture, sell or use any devices whatsoever".

It is respectfully submitted that there is no question involved herein as to the acts of the vendee (Earl S. Douglass) referred to and there is no evidence in the Transcript of Record presented to this Court which states what said vendee may or may not do. The only evidence which was ever submitted on this point was the testimony of said vendee, which is not a part of the Transcript of Record, and which Respondent feels was not conclusive as to what act or acts said vendee might commit. In view of the fact the question presupposes a fact not in the Transcript Record, it is respectfully submitted that the question is improperly presented to this Court.

Therefore Respondent urges that the above quoted questions raised by Petitioners relating to the "sole act of selling one's own patent *in and of itself*" are not properly before the Court and need not and should not be considered.

B. Question Relating to Contributory Infringement.

The Petitioners further ask:

> "Is the act of granting a license under a patent an act of contributory infringement of a third

> party's patent where the acts of the licensee in making, selling and using the licensed devices are legal because of invalidity of the third party's patent as to licensee?"

There is no holding at any point in the case that the act of granting a license under a patent is "an act of contributory infringement of a third party's patent where *the acts of the licensee in making, selling and using the licensed devices are legal because of invalidity of the third party's patent as to licensee.*"

In the first place, the phrase "contributory infringement" is nowhere to be found either in the Findings or Conclusions of the District Court nor in the Opinion of the Circuit Court of Appeals. The question of "contributory infringement" is one entirely of the Petitioner's own making.

In addition thereto the Petitioners base their question upon the "invalidity of the third party's patent as to licensee." It is respectfully submitted that there is no finding anywhere in this case that the patent is invalid as to the licensee, Rilling-Arnao Company. That matter has *never* been adjudicated and at best, Petitioners' statements relating thereto are merely the opinion of Petitioners' counsel.

In addition, we respectfully point out to this Court that in both this question and the question Respondent next discusses, the Petitioners raise in their own defense the matter

> "of invalidity of the third party's (respondent's) patent as to licensee"

and state:

> "that by judicial decision the patent of said third party (respondent) is invalid as to such licensee".

In the first place, Petitioners are estopped to deny the validity of the patent in suit. This was determined by the Circuit Court of Appeals in its opinion in United States Appliance Corporation v. Beauty Shop Supply Co. Inc., et al., 121 Fed. (2d) 149 (R. 135). (Certiorari denied by this Court, October Term, 1941, No. 632).

This being the case Petitioners cannot inject the question of invalidity into the case and seek to hide behind such a defense, even assuming it might be available to others.

Furthermore the premise is entirely without foundation. There is no holding "by judicial decision" or otherwise that Respondent's patent in suit is invalid "as to licensee", Rilling-Arnao Company. The Circuit Court of Appeals determined that the patent was invalid as to Beauty Shop Supply Co. Inc. but made no finding as to the licensee (Rilling-Arnao Company) nor could the Court do so, inasmuch as Rilling-Arnao Company was not a party to the suit. The Petitioners are apparently trying to stretch the finding of the court with respect to Beauty Shop Supply Co. Inc. to cover Rilling-Arnao Company through some far fetched theory of agency between the two. For example, on Page 4 of the Petition, they twice refer to:

> "the Beauty Shop Supply Co. Inc., a selling agent of Rilling-Arnao Company (licensee)"

This attempt is ridiculous inasmuch as in the earlier opinion of the Circuit Court of Appeals we find the Court stating (R. 140):

> "In support of its contention that this company (Beauty Shop Supply Co. Inc.) is the agent of the Rilling-Arnao Company Plaintiff points to a contract between these companies as set forth in the record; but that contract fails to disclose any provision for an agency. In the absence of other evidence sufficient to establish such relationship it must be held that the defendant Beauty Shop Company, Inc., acted independently as a purchaser from the Rilling-Arnao Company and is not estopped from disputing the validity of plaintiff's patent by reason of its dealings with that company."

It is well settled that a decision of invalidity in a patent infringement suit does not establish invalidity as "to all the world" (Petition, page 6) or to anyone other than the parties to the suit. Since there is no judicial decision that the patent is invalid as to the Rilling-Arnao Company (licensee) the patent owner, Respondent, may at this time sue the Rilling-Arnao Company for patent infringement and the Rilling-Arnao Company must present a case of invalidity and may not rely upon any of the record herein as being res adjudicata. While the opinion of the Circuit Court of Appeals holding the patent invalid as to the Beauty Shop Supply Co., Inc., would be persuasive upon any other Court it would not determine the issue of invalidity.

Since:

1. the licensee (Rilling-Arnao Company) was not a party to the suit and

2. there was no agency relationship between it and Beauty Shop Supply Co., Inc., and

3. the decision of invalidity can in no way be found to relate to licensee (Rilling-Arno Company) and

4. Petitioners cannot enjoy the benefit of a holding of invalidity since they are estopped to deny the same or raise the question,

it is respectfully submitted that Petitioners' questions which involve the validity of the patent as to licensee are not well taken and are not properly before this Court for its consideration.

Furthermore, the specific question Respondent is discussing here is improperly presented because it raises the matter of "contributory infringement" which, aside from this question, can nowhere be found in any prior finding, conclusion, judgment or opinion in this case and therefore may not be raised.

C. Question Involving the Invalidity of the Patent.

The Petitioners next ask:

"Does the act of disclosing to a prospective licensee a model or models of an invention and then subsequently granting a license under patents owned by licensor without any participation by licensor in the manufacture, use or sale of the devices by the licensee constitute an act of infringement of a patent owned by a third party

such as to make such licensor liable in damages for any portion of the royalties it has received from such licensee, particularly in view of the fact that *by judicial decision the patent of said third party is invalid as to such licensee, making its acts legal?"*

As has been pointed out, this question involves the premise that *"by judicial decision"* the patent of said third party is invalid, as to such licensee. As has been pointed out the premise is false and therefore the question is improper.

D. The Other Questions.

In its other aspects the immediately preceding question may be discussed in conjunction with the Petitioners' following two queries:

"Does the mere act of granting a license under patents owned by licensor without any participation in the manufacture, use or sale of devices manufactured by the licensee in itself constitute an act of patent infringement by the licensor of a patent owned by a third party such as to make such licensor liable in damages for the royalty it has received from such licensee in view of Sec. 4884 R. S. (U.S.C. Title 35, Sec. 40) and the decisions of this Court in Carbice Corporation v. American Patents Development Corp., 283 U. S. 27, 51 S. Ct. 334, 336, and Mercoid Corporation v. Mid-Continent Inv. Co., 320 U. S. 661, 64 S. Ct. 268, 274?"

and

"Is the act of granting a license under a patent in and of itself an act of patent infringement?"

The proper consideration of these questions requires a study of the opinion of the Circuit Court of Appeals; the Judgment of the District Court which was affirmed and the findings upon which the Judgment was based; and the facts of the case as they are found in the Transcript of Record. We shall discuss these in reverse order.

1. **The Facts of the Case.**

Substantially all of the facts of this case were placed before the Court in the Petition for Writ of Certiorari and Transcript of Record presented by the same Petitioners in *Tomlinson I. Moseley et al. v. United States Appliance Corporation,* October Term 1941, No. 632.

Respondent's patent was issued on December 18, 1934. The Petitioner Keele made a device (hereinafter called the infringing device) and on December 13, 1935, the Petitioners Keele and Moseley agreed that Keele should "convey" to Moseley a one-half interest in the claimed invention (the infringing device) and should apply for a patent therefor, that Moseley should "finance" the patenting thereof, and that all profits derived therefrom should be divided equally between them. Pursuant to this agreement, Keele assigned to Moseley a one-half interest in the claimed invention (the infringing device) and applied for a patent thereon.

About the middle of 1936, Petitioner Keele, acting for himself and Moseley, had an interview with the president of the Rilling-Arnao Company, the licensee

heretofore referred to, showed the officer the infringing device, showed him how it worked, and told him that he, the Petitioner Keele, had invented the same. Thereby, Keele sought to and did, interest the Rilling-Arnao Company in obtaining a license to manufacture and sell the infringing device.

Subsequently, on October 22, 1936, Keele and Moseley formed the Petitioner Keelmo Co., a California corporation. Keelmo Co. was dominated and controlled by the Petitioners Keele and Moseley. They owned all the stock. They and their attorney were its directors. Moseley was its president, Keele its vice-president. On November 29, 1936, the Petitioners Keele and Moseley assigned to the Petitioner Keelmo Co. all their "right, title and interest in, to and under" the claimed invention (the infringing device) and any patent which might be issued therefor. Subsequently a patent for the infringing device was issued to Keele, as assignor to the Petitioner Keelmo Co., on January 16, 1940.

On February 25, 1937, the Petitioner Keelmo Co. and Rilling-Arnao Company (licensee) made an agreement whereby Keelmo Co. licensed Rilling-Arnao Company to manufacture and sell the infringing device. In consideration thereof, the Rilling-Arnao Company paid the Keelmo Co. $2500 and agreed to pay it specified royalties thereafter. Pursuant to the agreement the Rilling-Arnao Company manufactured and sold the infringing device and paid the Keelmo Co. substantial royalties. Subsequently the Keelmo Co. sold the "license agreement between said Keelmo Co.

and the Rilling-Arnao Company and the patents specified therein," said patent being the patent for the infringing device.

The District Court summarized all of the foregoing and found (R. 167):

> "That the Defendants' accountable infringement complained of consists of Defendants contacting the Rilling-Arnao Company, turning over certain information to the Rilling-Arnao Company, and licensing the Rilling-Arnao Company to manufacture the device complained of."

This brief analysis reveals that the Keelmo Co. and the Petitioners Keele and Moseley profited from the manufacture of the accused infringing device by the Rilling-Arnao Company. The Petitioners could not make such a device themselves since (1) they are estopped to deny the validity of Respondents' patent and (2) the accused device is an infringement thereof. Of this there can be no dispute. (United States Appliance Corporation v. Beauty Shop Supply Co. Ltd., et al., 121 Fed. (2d) 149, certiorari denied, October Term, 1941, No. 632.) Therefore, the Petitioners should not be allowed to profit from the manufacture and sale of such a device by another and the award of their profits to Respondent is proper.

2. The Judgment of the District Court.

The Judgment of the District Court (R. 179):

> 1. That the Plaintiff recover from the Defendants and/or either of them, the sum of $7591.64 with interest at the rate of six percent

per annum from the date of May 4, 1944, until paid.

2. That the Plaintiff recover from the Defendants and/or either of them the sum of $3994.49 with interest at the rate of six percent per annum from the date of 1944, until paid.

was based upon its undisputed Orders dated May 4, 1944 (as amended) (R. 166) and November 14, 1944 (R. 176):

1. That the Defendants' accountable infringement complained of consists of the Defendants' contacting the Rilling-Arnao Company, turning over certain information to the Rilling-Arnao Company, and licensing the Rilling-Arnao Company to manufacture the device complained of.

and

"That from November 1, 1942 to the date hereof, the Defendant Keelmo Company received royalties in the amount of $4,964.82 and the sum of $4,000.00 for the sale of license agreement between said Keelmo Company and the Rilling-Arnao Co. and the patents specified therein, both of which constitute accountable profits of the Keelmo Company."

3. The Opinion of the Circuit Court of Appeals.

The foregoing discussion of the Facts and Judgment shows that in reality the Circuit Court of Appeals, in affirming the Judgment of the District Court merely held that the Petitioners herein had to account for the profits which they had derived by virtue of

their having contacted the Rilling-Arnao Company, turned over certain information to the Rilling-Arnao Company, and licensed the Rilling-Arnao Company to manufacture the device complained of.

A review of the entire case and the relationship of the parties reveals that the decisions made in this case by the various courts and particularly the opinion rendered by the Circuit Court of Appeals and appealed from herein, are not as sinister as the Petitioners would have this Court believe.

The statement by the Circuit Court of Appeals, which is so happily seized upon by the Petitioners (that "the act of licensing Rilling-Arnao Company to manufacture and sell the infringing device was itself an act of infringement") should not be isolated but must be read in conjunction with the rest of the Opinion of the Circuit Court of Appeals and with an eye to the facts of the present case.

An analysis of the Opinion shows that the Court made a careful study of the facts and had them in mind when writing the Opinion. For example, the Court analyzed carefully all of the acts of the Petitioners. After stating that "the act of licensing Rilling-Arnao Company to manufacture and sell the infringing device was itself an act of infringement", the Court enlarged thereon and explained that "In that act, all the appellants—Keele, Moseley and Keelmo Company—participated; for, though not named as parties to the license agreement, Keele and Moseley caused the license to be made. Keele, acting for himself and Moseley, commenced the negotiations which

resulted in the agreement." Earlier the Court referred to the fact that Petitioner "Keele, acting for himself and Moseley, had an interview with Paul Rilling, president of Rilling-Arnao Company, showed Rilling the infringing device, showed him how it worked, and told him that he, Keele, had invented it." The Court found that " * * * Keele sought to, and did, interest Rilling-Arnao Company in obtaining a license to manufacture and sell the infringing device".

The Court further referred to the acts of Petitioners which led up to and resulted in the execution of the license agreement and said these acts "included the acts of making and using the infringing device".

In addition these acts must be deemed to have included "contacting the Rilling-Arnao Company and turning over certain information to the Rilling-Arnao Company as found by the District Court. (R. 167.)

It is absurd to believe that the "act of licensing" referred to by the Circuit Court in its opinion was meant to include only the act of signing a piece of paper. The signing of a piece of paper is but one of many steps including:

1. first making and using the infringing device.

2. showing the president of the prospective licensee the infringing device.

3. turning over certain information, including models and designs to the prospective licensee.

4. causing an exclusive license agreement to be made and signing a piece of paper and

5. profiting from the license agreement.

The "act of licensing" referred to by the Court, and so happily seized upon by the Petitioners, is in reality one transaction and it is this transaction, involving as it does all of the above single components which amounts to infringement. And especially is this true in the instant case when the Petitioners went so far; where in the words of the Petitioner Moseley (R. 40):

> "We selected the material, submitted it to Rilling-Arnao Company, and they made it in accord with the designs we submitted."
>
> ("We" in this instance being the Petitioners herein.)

and where, as Petitioner Moseley states (R. 39), Petitioners "submitted this model to Rilling-Arnao Company and they took our submitted models".

The foregoing analysis of the questions involved, the facts of the case and the Opinion of the Circuit Court of Appeals will, it is hoped, make the remainder of this Brief more easily followed and point out the fallacies of Petitioners' case.

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3. THE QUESTION REALLY INVOLVED.

In reality, therefore, the question of patent law involved herein is:

Do the acts of:

1. making and using an infringing device
2. showing a prospective licensee the infringing device

3. turning over certain information, including models and designs of the infringing device

4. causing an exclusive license agreement with minimum royalty provisions to be made and

5. profiting from the license agreement,

taken together, amount to infringement of a third party's patent, for which the licensor is liable for any portion of the royalty received from his license.

A. The Law of Infringement.

The Petitioners would have this Court believe that the question to be decided by this Court is entirely new and novel and amounts to a startling development in and departure from conventional patent law.

It is respectfully submitted that, on the contrary, the matter raised in the Petition and in this Brief is merely a statement of the law as the same has existed since the case of *Toppan v. Tiffany Refrigerator Car Company,* 39 Fed. 480, which was decided in 1889. Surely the doctrine can not be said to be new. The doctrine is not an isolated one; as the Circuit Court of Appeals in its opinion pointed out the doctrine has been expressed and reaffirmed in the cases of *National Mechanical Directory Co. v. Polk,* 9 Cir., 121 F. 742; *Ruth v. Stearns-Roger Mfg. Co.,* D.C. Colo., 13 F. Supp. 697, 714, affirmed in *Stearns-Roger Mfg. Co. v. Ruth,* 10 Cir., 62 F. (2d) 442, and in the text books, particularly *Walker on Patents,* Deller's edition, Sec. 437, p. 1169. A doctrine which is found in the text books and which is clearly expressed in the case law

cannot be said to be novel. It will further be noted that the Petitioners are unable to allege or urge that this doctrine has been upset by any Court or that there are contrary decisions or contrary statements in the text books.

An analysis of the law relied upon may be helpful.

The Respondent's position is sound in law. For example, an examination of the case of *Toppan v. Tiffany Refrigerator Car Co.,* 39 Fed. 420, reveals that the only act of the defendant in that case was the selling of plans from which the ultimate user (of the plans) built the infringing device, and the District Court in that case determined that the making of the drawings and furnishing them to the ultimate user constituted an infringing act.

The device in the case at bar which was held to be an infringing device was a "Koolerwave" jacket made by the Rilling-Arnao Company, the licensee of Respondent, Keelmo Co. The Keelmo Co. submitted models and plans of the device, licensed its manufacture and sale and collected a royalty under the license. It should be noted that the *Toppan* case made no statement with respect to the alleged acts of infringement by any other party but merely found the Defendant guilty of infringement because he supplied plans, drawings, and specifications of the infringing device.

A second case is that of *National Mechanical Directory Co. et al. v. Polk et al.,* 121 Fed. 742, CCA 9. The facts of that case were as follows: One Maxwell was the inventor and the applicant for the patent under

which the infringing device was manufactured. He and other incorporated co-defendant National Mechanical Director Co. (called National) and by virtue of an agreement between Maxwell and National dated March 29, 1900, that corporation was licensed under his patent and that corporation returned a license to Maxwell to manufacture, use and sell the device in Southern California. Maxwell in that agreement agreed to commence operations within sixty days of April 1, 1900, and to have eight hundred mechanical directories in use and in operation in the City of Los Angeles within nine months of that date. On May 24, 1900, Maxwell entered into an agreement with the Los Angeles Modern Directory Company in which he sublicensed it coextensively with his license with the National Company, that is, he sublicensed it for the area of Southern California. The machine which was actually built and which was held to be an infringement was manufactured and placed in operation by the Los Angeles Modern Directory Company under its license from Maxwell.

All three of the defendants, Maxwell, the National Company, and the Los Angeles Company were enjoined. All three of these defendants were infringers. The facts show that Maxwell invented, licensed and received royalties and incorporated one of the other defendants. Maxwell agreed to have a number of these machines in operation within a short time after the execution of the first agreement. For that purpose he licensed the Los Angeles Company to do that work. There is no evidence that Maxwell as an individual

installed a single machine. Therefore (and incidentally this case cites with approval the case of *Toppan v. Tiffany,* previously cited herein) this Circuit Court held that the licensor who collects royalties and who also designs the infringing device is guilty of infringement and may be enjoined.

It should be pointed out that Maxwell did receive a royalty inasmuch as the case indicates that the Los Angeles corporation agreed to pay Maxwell ten per cent of the gross proceeds of the business up to a certain amount. The facts of this case show that Maxwell did not actually install or operate or manufacture any of the apparatus himself. He merely sublicensed the Los Angeles Company to do so and the Los Angeles Company built the one infringing machine. Maxwell did not build or use this machine but only licensed its manufacture and use.

The Petitioners urge that this Court exercise its discretionary power because the issues involved herein are of great moment to the public, that the public's interest in an alleged extension of the patent law should be considered, that the Circuit Court of Appeals has decided a question not previously decided by this Court and that the Circuit Court of Appeals has rendered a decision probably in conflict with earlier decisions of this Court. In support of their contention that the issue herein involved is of great public moment the Petitioners charge that the Circuit Court found "that the mere act of licensing" under a patent and the act of "selling a patent" in and of themselves constitute acts of infringement. As has been earlier

pointed out in this Brief both of these assumptions are false. The act of selling a patent in and of itself is not up for consideration at this time nor has it ever been involved in this case. The act of licensing under a patent as has previously been pointed out consists of more than the Petitioners would have this Court believe. An analysis of the cases on this point and of the findings and opinions discloses that the same are not novel and do not extend the law.

---

4. THERE IS NO NEED FOR THE COURT TO REVIEW THE JUDGMENT INVOLVED.

While it is true that the public's interest in any doctrine must be considered, it is respectfully submitted that there is no showing that the matters herein involved constitute such "extension of the patent monopoly" as Petitioners would have us believe.

While it is true that this Court has never decided the specific question herein raised no sufficient reason is evinced that the same need be settled by this Court at this time.

The Petitioners' suggestion that the Circuit Court of Appeals has rendered a decision probably in conflict with other decisions of this Court, is, it is respectfully submitted, incorrect. This Court, in the cases cited by Petitioners, did not have before it situations similar to those in the case at bar. The enunciations of the Court, therefore, are not in conflict with the law of this case inasmuch as the decisions rendered had nothing to do with the question here involved.

CONCLUSION.

It is respectfully submitted that this Court should deny the Petitioners' Petition for Writ of Certiorari as the same does not advance questions requiring the exercise of this Court's discretionary power.

Dated, San Francisco, California,
July 3, 1946.

Respectfully submitted,
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